The second and last consideration is whether the Industrial Court's finding that the company, in refusing to reinstate the workmen, had declared a lock-out. It appears to me that if the management took this action with the knowledge or reasonable expectation that the workmen would be willing to return to work on February 16, 1974 and carry out their working obligations, then its act might in certain circumstances constitute a lock-out. It is necessary to look at the situation on that day, not with the benefit of hindsight, but in the light of the situation then prevailing. On February 12, 1974 the Minister had indicated his intention to refer the trade dispute to the Industrial Court. Both the management and the union were notified of the Minister's intervention. The union on receipt of that communication had instructed its members to call off the strike and return for work on February 16, 1974. They reported for work on that day but the management refused to take them back. It therefore seems to me clear that on that day the workmen had no longer wished to withdraw their labour and wanted to go back to work. They had, in my view, clearly ceased to be on strike and the management knew it was no longer under strike pressure. The inference is that it could reasonably expect that the workmen would be ready and willing to resume work. I therefore see no ground for setting aside the Industrial Court's finding that there was a lock-out: on the contrary, I would have been very much surprised if it had been the other way.

I say it again that workmen are entitled to withdraw their labour by concerted action for any lawful purpose connected with management. Workmen who down tools do not risk the loss of their employment. The contracts of service are suspended by the strike, they are not terminated, and the workmen are entitled to be put back to the status quo on the same terms and conditions. Much had been canvassed in the court below and before us to the two warning notices given by the company indicating that if the workmen did not return to work by a certain date, they would be deemed to have abandoned their contracts of service. In my opinion, the management could not, by imposing a new term of service, unilaterally convert the absence from work of the workmen who had gone on strike into abandonment of their contracts of service.

I would allow the appeal with costs to the appellants both here and in the court below, setting aside the order of the High Court and restoring the award of the Industrial Court.

Gill C.J. (Malaya) and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *Xavier & Vadiveloo; Shearn Delamore & Co.*

KHOR KUEK JIN v. HAJI YASIN & ORS.

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) April 16, 1976]

[Penang — Federal Court Civil Appeal No. 76 of 1975]

Equity and Trusts — Constructive trust — Money had and received to the use of the claimants — Whether claim barred by limitation.

This was an appeal from the decision of Arulanandom J. who ordered the appellant to pay to the respondents a sum of $59,040 which he had received from the State Government as compensation on acquisition of part of the land which he had sold to a buyer who had in turn sold it to the respondents.

Held, dismissing the appeal: (1) the learned trial judge was right in holding that the appellant was in fact a constructive trustee of the money which had been paid to him on behalf of the purchasers;

(2) the money paid to the appellant could be recovered from him as money had and received by him to the use of the respondents;

(3) the claim was not statute barred, as the respondents did not know until 1970 that the money had been paid to the appellant.

Case referred to:-

(1) *Soar* v. *Ashwell* [1893] 2 Q.B. 390, 400.

FEDERAL COURT.

Lim Ewe Hock (*V. Veerappan* with him) for the appellant.

G. Moganasundram for the respondents.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal from a judgment of Arulanandom J. whereby the appellant as second defendant in the action was ordered to pay to the respondents as plaintiffs a sum of $59,040 which he had received from the State Government of Penang as compensation on acquisition of a part of the land which he had sold to the first defendant and which the first defendant in turn had sold to the plaintiffs.

The facts of the case very briefly were that under an Indenture dated July 2, 1958, which was registered in the Registry of Deeds, Penang on August 14, 1958, the plaintiffs and two other persons purchased from the first defendant approximately 213.4 acres of land out of a large piece of land comprised in statutory grant No. 18892 for Lot 287(1) Mukim II in the southern District of Province Wellesley. The first defendant had bought the said 213.4 acres of land from the second defendant and two others under an Indenture dated July 5, 1957.

In 1956 the second defendant had agreed to surrender free to the Government approximately 662 acres of land out of Lot 287(1) and some other Lots for the Nibong Tebal Drainage Scheme. In or about July 1964 the Government took steps to acquire a further area of 171.82 acres out of those lots so as to provide for a total area of 833.82 acres for the scheme. In respect of the acquisition of the area required by the Government for the scheme the Collector of Land Revenue, Nibong Tebal held an inquiry, being Inquiry No. 12/64(2) on February 25, 1965. The second defendant gave evidence at the inquiry for himself and on behalf of his co-owners of the various lots under which the lands to be acquired were held. What he said in his evidence was this. Out of the

total area required by the Government he wished to claim compensation for 171.82 acres only. Out of the 171.82 acres 12.12 acres belonged to him in his own right for which the compensation should be paid to him, and his partners had agreed that compensation for the remaining 159.7 acres should also be paid to him. After the agreement to surrender 662 acres to the Government he and his partners had sold part of the lands affected by the acquisition. He undertook to pay those purchasers their share of the compensation.

At the conclusion of the inquiry the Collector of Land Revenue made the following order.

"For lot 288(44) — (45) 12.12 acres pay to Khor Kuek Jin $14,907.60 at $1,230 per acre. It is further ordered that the compensation for other lots whose area to be paid for is 159.7 acres at $1,230 per acre amounting to $196,431 (One hundred and ninety six thousand four hundred and thirty one only) be paid as prayed for in the name of Khor Kuek Jin. It is further ordered that this money when claimed by the purchasers should be paid to them accordingly."

The plaintiffs had heard about the proposed acquisition but it was not until some time in 1970 that they came to know that the money had been paid out to the second defendant. They asked him to pay their share of the money. He offered to pay $150 per acre. As the offer was not acceptable to them, the plaintiffs commenced their action on May 24, 1973.

In their statement of claim the plaintiffs alleged that the second defendant had wilfully refused to make payment to them of the money which he had received from the Government on their behalf. They alleged fraud on the part of the second defendant in holding himself out to the Government as representing the plaintiffs without their prior authority and in having undertaken to the Government to pay out their share of the compensation when he had no intention of doing so. They claimed that by his undertaking he had constituted himself a trustee for them and was therefore liable to pay their respective shares amounting to $59,040.

The plaintiffs also sued the first defendant in the alternative for compensation. The first defendant in his defence accepted the plaintiffs' allegations and in his statement of defence joined the plaintiffs in claiming the said sum from the second defendant, but at the start of the trial abandoned this claim and only asked for the suit against him to be dismissed with costs.

Notwithstanding what transpired at the Collector's inquiry, in his statement of defence the second defendant denied that the rate of compensation was $1,230 per acre or that he had received any money on behalf of the plaintiffs. He stated that the amount of $196,431 was for the acquisition by the Government of a total of 821 acres. He averred that the portions of lands sold to the first defendant were estimated to contain an area of 213.34 acres subject to survey and adjustment in price and that he was willing to pay compensation at the rate of $100 as adjustment in the price for the shortage which arose in the areas sold as a result of the acquisition. Further and in the alternative he pleaded limitation.

At the commencement of the trial of the action the second defendant's counsel raised two preliminary objections, namely, that the plaintiffs should have appealed against the collector's award made on acquisition and that their claim was statute barred as there was no express trust. The learned judge overruled both objections on the grounds that the plaintiffs were not complaining about the award itself, that the State Authority had dealt with the second defendant and two others as the registered owners of the land, that the moment the second defendant was fully paid for the said land and the indenture executed and registered he became a bare trustee for the purchasers, and that as such the claim was not barred by limitation as the word "trustee" extended to implied and constructive trusts.

After this ruling counsel for the second defendant admitted that his client had received payment of the compensation and that he had not made any payment to the first defendant or the plaintiffs. It was, however, not admitted that any of the plaintiffs' lands were affected by the acquisition. The parties then agreed that the issues were narrowed down to the question whether or not the amount of compensation paid by the Government should be averaged out to include even lands surrendered free by the second defendant to the Government.

From the evidence produced before the learned trial judge it was clear that no compensation was paid for the land which was surrendered by the second defendant, that for the rest of the lands acquired compensation was paid at the rate of $1,230 and that the second defendant received compensation on behalf of purchasers of 159.7 acres. In addressing the court at the conclusion of the trial counsel for the second defendant agreed that the plaintiffs received 48 acres short of what was sold to them, but he submitted that there was a clause in the agreement of sale to provide for compensation between the parties. The learned judge, however, ruled that that clause was intended to provide for the differences in the areas after subdivision and was not intended to cover acquisition by Government. He also took the view that once the second defendant had been fully paid and had executed the necessary documents he became a bare trustee for the purchasers, so that he was liable to pay them whatever money was paid to him in that capacity under the collector's order. In the result he gave judgment for the plaintiffs.

The first point which counsel for the appellant made at the hearing of the appeal before us was that as no separate titles had been issued to the respondents up to the time of acquisition, the collector paid out the money to the appellant under a mistake of law, because he thought that the compensation was payable to the appellant notwithstanding the fact that parts of the land been sold to the respondents. In other words, it was said that the collector thought that in law compensation was payable to the appellant, although the view which he took was mistaken. We found no substance in the point raised as it was clear from what transpired at the collector's inquiry and the order which he made that the money was to be paid to the appellant on his undertaking to pay to the purchasers. Thus the money was not paid out to the appellant either under a mistake of law or a mistake of fact.

It was next contended on behalf of the appellant that no trust was created by the undertaking given by him to pay the money to the purchasers. We agreed with the submission that there was no express declaration of trust by the appellant to the effect that he will hold the money for the respondents. Counsel for the respondents also agreed that there was no express trust as such, but he submitted that by his conduct the appellant had become a constructive trustee for the respondents. For this he relied on the following passage from the judgment of Kay L.J. in *Soar* v. *Ashwell*[1]: —

"Generally speaking, a person who is not the appointed trustee and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were; which is commonly expressed by saying that he is not an express but a constructive trustee."

At page 405, the learned judge had this to say about limitation:

"The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence."

In our judgment the learned trial judge was right in holding that the appellant was in fact a constructive trustee of the money which had been paid to him on behalf of the purchasers.

Counsel for the appellant next dealt with the question as to whether the money paid out to the appellant could be recovered from him as money had and received by him to the use of the respondents. In this connection he submitted that the respondents had abandoned their cause of action for money had and received by not making any mention of it in their prayer to the statement of claim. Counsel for the respondents contended that there was no abandonment by the respondents of paragraphs 5, 6, 7 and 8 of their statement of claim which formed the basis of their claim for money had and received. He submitted further that the omission in prayer A(ii) to refer to the sum of $59,040 as money had and received did not alter the basis of the claim. We agreed with that submission. The fact that the respondents did not know until 1970 that the money had been paid out to the appellant was never in question, so that the period of limitation ran from that year, with the result that the action was not statute barred.

The only other ground taken on behalf of the appellant was that if the respondents were entitled to any compensation they could only claim it under paragraph 3(g) of their agreement of sale with the first defendant. In our judgment, that clause in the agreement of sale applied only to compensation in relation to any discrepancy in the area agreed to be sold after resurvey.

For the reasons we have stated we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *V. Veerappan; Yeoh Kian Teck & Co.*

N.T.S. ARUMUGAM PILLAI v. GOVERNMENT OF MALAYSIA

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) April 16, 1976]

[Penang — Federal Court Civil Appeal No. 147 of 1975]

Income Tax — Claim for additional tax — Leave to sign final judgment given — Appeal from decision of Judge — Whether limitation applies to proceedings by Government for recovery of tax — Limitation Ordinance, 1953, s. 33(1) — Income Tax Act, 1967, ss. 91 and 106(3).

This was an appeal from the decision of Arulanandom J. who had given leave to the Government to sign final judgment against the appellant on a claim for additional income tax. The main contention on behalf of the appellant was that the additional assessments for the years of assessment 1953 and 1958 were statute barred because they were not made before the expiration of twelve years from the respective years of assessment.

Held, dismissing the appeal: (1) limitation as such does not apply to any proceedings by the Government for the recovery of any tax;

(2) the words "within twelve years" in section 91(3) of the Income Tax Act, 1967, are irrelevant where there has been any wilful default on the part of the taxpayer in disclosing part of his income for any particular year of assessment;

(3) under section 106(3) of the Income Tax Act, 1967 the court was not able to entertain any plea that the amount of tax sought to be recovered was excessive or incorrectly assessed.

Case referred to:-

(1) *Arumugam Pillai* v. *Government of Malaysia* [1975] 2 M.L.J. 29.

FEDERAL COURT.

K. Chandra for the appellant.

Mokhtar bin Haji Sidin (Sr. Federal Counsel) for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal by the defendant in the action from a decision of Arulanandom J. granting the application under Order 14 by the respondent as plaintiff for leave to sign final judgment on his claim against the defendant for the sum of $5,262,844.67 with interest and costs.

The plaintiff's claim was in respect of additional income tax due for the years of assessment 1953 and 1958, income tax for the years of assessment 1966, 1967, 1968, 1969, 1970, 1973 and 1974 and the 10% increase levied under section 103(4) of the Income Tax Act, 1967.

The first 4 grounds of appeal against the learned judge's decision, as stated by counsel for the appellant at the very outset, were similar to the grounds of appeal which this court rejected in a similar appeal by the same appellant in *Arumugam Pillai* v. *Government of Malaysia*.[1] He urged nothing new in support of these grounds in this appeal, and we could find no reason to differ from what we said regarding them in the earlier appeal.

The 5th and 6th grounds of appeal respectively were that the learned judge erred in law when he held that he could not consider the defence that the additional assessments for 1953 and 1958 are statute barred because it had not been pleaded in the defence and that he erred in law when he held that there was wilful default on the part of the defendant. In this